



POLICE DEPARTMENT

April 22, 2019

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In the Matter of the Charges and Specifications : Case No.
- against - : 2017-18139
Police Officer William Innes :
Tax Registry No. 923973 :
13 Precinct :
-----X-----

At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Jeff S. Adler
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Penny Bluford-Garrett, Esq.
Department Advocate's Office
One Police Plaza
New York, NY 10038

For the Respondent: John Tynan, Esq.
Worth, Longworth & London
111 John Street
New York, NY 10038

To:

HONORABLE JAMES P. O'NEILL
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

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CHARGES AND SPECIFICATIONS

1. Said Police Officer William Innes, while on-duty and assigned to the 13th Precinct, on or about June 25, 2017, in the vicinity of East 23rd Street and the FDR Drive, wrongfully discharged his service weapon at a moving vehicle.

P.G. 221-01, Page 3, Paragraph 1(f) FORCE GUIDELINES

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on December 20, 2018, and March 20 and 22, 2019. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. The Department called Police Officer Alexander Kayen, Sergeant Angel Burgos, Lieutenant John Natoli, Gloria Jenkins, and Edward Stanulis as witnesses, and introduced the hearsay statement of Person A. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having reviewed all of the evidence in this matter, I find Respondent guilty, and recommend that he forfeit fifteen (15) vacation days.

ANALYSIS

As party boats return to the marina in the vicinity of East 23 Street and the FDR Drive, they often bring rowdy, intoxicated partygoers with them. Manhattan's 13th precinct frequently has to deal with the aftermath of these "booze cruises," including assaults and robberies. The precinct regularly has a sector assigned to the marina when the boats come in, usually around 0330 hours. However, on the morning of June 25, 2017, the boats came in about a half-hour early.

Before officers were in place to deal with those who disembarked, a large fight broke out that spilled over into the adjoining parking garage. At approximately 0312 hours, Respondent and his partner, Officer Alexander Kayen, both in uniform, responded to a radio run of a fight at the location. As the officers exited their vehicle and approached on foot, a vehicle sped through the garage exit behind another car while the exit gate arm was still up. On days where there are boat parties, the garage normally requires parkers to pre-pay; that day they did not do so. After that car sped off without paying, another vehicle, a black SUV, drove through the exit arm and struck Respondent, who was standing outside the exit. The impact sent Respondent over the hood of the vehicle, and he landed on the ground on the passenger side. From a kneeling position, Respondent quickly fired one shot at the SUV, striking the hubcap of the rear right tire. The SUV came to an immediate stop, and the driver was apprehended. At issue is whether Respondent's discharge of his firearm was wrongful under the circumstances.

Gloria Jenkins testified that she was working as a parking attendant on the night of the incident. Jenkins called 911 to report that people were fighting, then came out of her office and walked to the area by the exit. As she was standing outside, Jenkins observed the black SUV barrel through the arm of the exit gate without waiting to pay. Jenkins' co-worker by the booth screamed at the SUV driver to stop, as did police officers on the scene, but the SUV continued forward and struck one of the officers. Jenkins watched as the officer fell to the ground, got up on one knee, and quickly fired one shot toward the back of the vehicle. (Tr. 152-55, 157-61, 164)

Edward Stanulis testified that he was working by the pier on the night of the incident. He believed there was going to be a fight and called 911. A couple of minutes later an RMP arrived, and two police officers walked toward the garage. From about 15 feet away, Stanulis observed the SUV drive through the arm of the exit gate and strike one of the officers (Tr. 173-74)

Officer Kayen testified that upon arrival at the garage, he approached the male gate attendant who was standing by the booth just outside the garage, asking for assistance. Officer Kayen observed a large group of people fighting inside the garage. As he was speaking with the attendant, Officer Kayen saw a silver car speed out of the garage, just as the arm of the exit gate was being lowered; the arm actually clipped the car. After the arm was back down, a black SUV drove through the gate and struck Respondent, who was standing directly in front of the vehicle. Officer Kayen could not recall seeing anyone else in front of the vehicle. The impact propelled Respondent up and over the hood toward the passenger side of the SUV. Officer Kayen estimated that the vehicle was moving about 20-30 mph at the point of contact. Almost immediately after impact, Officer Kayen heard one gunshot, and observed Respondent on his knee with a firearm in his hand, arm extended toward the SUV. (Tr. 11-12, 17, 27, 38-41, 44-45)

According to Officer Kayen, the SUV stopped and he proceeded to the driver's side of the vehicle. Officer Kayen could not see through the vehicle's dark tinted windows, so he used his asp to crack open the driver-side window, then ordered the driver to exit the SUV and get on the ground, which he did. Officer Kayen handcuffed the driver, Person A, then stood over him while also holding the SUV's rear passenger at gun point until additional officers arrived to take over the situation. During his quick inspection of the SUV, Officer Kayen observed what appeared to be a bullet hole on the rear passenger-side tire. (Tr. 18, 21, 42)

Sergeant Angel Burgos of the 13th Precinct testified that when he arrived on the scene, Respondent and Officer Kayen already had the driver, Person A, on the ground handcuffed. Respondent informed Sergeant Burgos that he had been struck by the SUV and discharged his firearm. The sergeant took control of Respondent's firearm, which had one round in the chamber and 14 in the magazine. Respondent complained of an injury to his hand, and was

escorted to the hospital. Sergeant Burgos was informed by another officer that a shell casing had been found at the scene. (Tr. 51-52, 56-57, 60)

Lieutenant John Natoli of the Force Investigations Division ("FID") testified that he interviewed witnesses and reviewed forensic evidence and video footage in connection with this incident. The lieutenant also reviewed the Department's relevant procedures, memos and internal orders, including Patrol Guide section 221-01, "Force Guidelines." Lieutenant Natoli prepared a report in which FID concluded that Respondent's firearm discharge was not within Department guidelines.¹ (Tr. 65-66, 74, 119, 134-39)

The lieutenant testified that the driver of the SUV, Person A, was one of the witnesses interviewed by FID on June 25, as were the two other occupants of the SUV, who essentially corroborated Person A's account. Person A was arrested for reckless endangerment, and his case was later adjourned in contemplation of dismissal. Since Person A did not respond to numerous subpoenas to testify at this hearing, a copy of his videotaped statement, and the accompanying transcript, were admitted into evidence (Dept. Ex. 4 and 4A) (Tr. 67-70, 86, 90, 95, 121, 131).

In his statement, Person A stated that he was with his cousin and a friend on the party boat. After they got off the boat, there was a big brawl that had nothing to do with them. Person A and his companions entered the garage and took the elevator to the second floor to retrieve their SUV, which Person A drove downstairs. As he neared the exit, Person A observed people "whaling on" a car in front of his; someone threw a bottle through that car's rear window, and an individual was banging on that car with a two-by-four. The driver of the other car exited the garage and sped off, as the exit gate was lowered back down. (Dept. Ex. 4A at 4, 11)

¹ As indicated to the parties during the hearing, notwithstanding the recommendation in the FID report, this tribunal will make an independent determination as to whether the charge against Respondent has been proven by a preponderance of the credible evidence.

According to Person A, people were banging on his car, and Person A believed the glass was about to break. Not knowing what to do, Person A drove through the gate and struck Respondent with the front of his vehicle. Respondent flipped over the front hood from the driver's side. Person A insisted that the whole thing happened so fast; Person A did not see Respondent, nor did he hear any commands from Respondent, before Person A accidentally struck the officer. After the impact, Person A stopped his vehicle and put it in park. An officer shattered the driver-side front window with a club, and Person A complied with orders to exit the vehicle and get on the ground. Person A was extremely apologetic, both to the officers at the scene, and to the detectives during his interrogation. (Dept. Ex. 4A at 4-12)

A disc containing video footage from four camera angles was introduced as Dept. Ex. 2:

Video 1 ("Exit"): This footage is from an angle looking inside the garage, at the exit lane and the elevator area. At 02:21, Person A, wearing a white jersey with "21" on it, walks into the elevator area. At 07:50, a dark colored BMW pulls up in the exit lane behind another car waiting to exit. Several people approach the BMW, pulling on the door handles and banging on the windows. At 08:06, Person A's black SUV pulls up and stops behind the BMW. As the BMW moves forward, an individual swings a two-by-four at its rear window. The SUV moves forward and stops, with some in the crowd now focusing on the SUV. At 08:42 as the SUV drives forward toward the exit, the attendant can be seen tapping on the driver's side window, apparently trying to get the driver's attention. The SUV continues forward until it is off-screen.

Video 2 ("Cell actual"): The first ten seconds of this footage, recorded by a hot dog vendor, shows the black SUV exiting the garage and striking Respondent, who is standing in front of the vehicle. As the SUV continues forward, Respondent, still on the ground and approximately 10 feet behind the vehicle, fires one round toward the SUV, at which point the vehicle stops. No people can be seen standing directly in front of the SUV at the time

Respondent discharges his firearm, though there are several people who appear waiting to cross at the crosswalk in front of the vehicle.

Video 3 ("Entrance"): In this video taken from inside the garage looking out, the police car can be seen arriving at about the 06:50 mark. Ten seconds later, the exit gate is raised and one car exits, followed closely behind by a second vehicle that also speeds out before the arm of the gate is lowered. The attendant briefly runs in the direction of the departing vehicle, then walks back toward the booth. At about 07:22, Officer Kayen walks toward the booth while Respondent walks near the center of the exit lane. The black SUV pulls up at the exit gate, then speeds through the gate before coming to a stop.

Video 4 ("Cell post"): This video shows a closer view of Officer Kayen ordering the driver out of the SUV; the driver raises his hands and complies with the command to get on the ground.

From the "Cell Actual" video, Lieutenant Natoli took screen shots that were included in his report; four of those photographs were introduced into evidence (Dept. Ex. 3). Additionally, four crime scene photographs, depicting the black SUV and the area outside the garage, were admitted (Dept. Ex. 1).

Respondent testified that he and his partner responded to a radio run for a large fight at the location. Upon arrival, they saw a large group fighting outside. As Respondent was walking toward the garage, he observed a vehicle exit at a high rate of speed and proceed westbound on 23rd Street. Respondent was concerned the vehicle might strike the pedestrians crossing the street at the crosswalk, but fortunately no one was hit. (Tr. 180-83, 199-200, 203)

Respondent then turned his attention to inside the garage, where he noticed the SUV driving erratically toward the exit. The driver of the SUV pushed against the exit gate barrier. Respondent had his left hand up and drew his firearm with his right hand, as he and others were

telling the vehicle's driver to stop. Instead of stopping, the SUV accelerated through the barrier and hit Respondent, striking him in the head and running over his left hand. The contact sent Respondent over the hood of the car, and he fell to the ground on the passenger side of the vehicle. (Tr. 184, 186-88, 190, 216-17)

Respondent testified that he believed there were still people in front of the moving SUV, and he was concerned that it was "possibly going to hit somebody else." Respondent was determined to stop the vehicle without hurting anyone. From close range he fired one shot at the rear tire, hitting the hubcap, and the SUV stopped. According to Respondent, he acted consistently with a training memo he received in February of 2017 (Resp. Ex. A), that provided guidance for the use of force in a vehicle ramming attack. Specifically, he aimed for the tire, a secondary target area, rather than the operator of the SUV. (Tr. 191, 194-95, 208, 211-13, 218)

Specification 1 charges Respondent with wrongfully discharging his firearm at a moving vehicle. Section 221-01 (1)(f) of the Patrol Guide states that uniformed members of service "shall not discharge their firearms at or from a moving vehicle unless deadly physical force is being used against the member of the service or another person present, by means other than a moving vehicle." The section also notes, however, that any such violation may be reviewed by the "Use of Force Review Board" in order to determine whether there were exigent or exceptional circumstances present that rendered the officer's actions reasonable and justified, and therefore within the guidelines.

Here, based on the testimony of the eyewitnesses, the video footage, and Respondent's admission, it is undisputed that Respondent fired one round at the moving SUV, striking the hubcap of the rear-right tire. Specifically, he did so after the SUV drove through the exit gate of the garage and struck Respondent, propelling him over the hood of the vehicle. Respondent landed on the ground on the passenger side of the SUV. In a split-second, Respondent got up on

one knee and fired the shot at the moving vehicle. The SUV immediately stopped, and the driver was apprehended

What is in dispute is whether Respondent's act of discharging his weapon, under these particular circumstances, constituted misconduct. Respondent explained that he felt justified in firing his weapon because he was concerned that the vehicle might strike innocent pedestrians in the area. However, the Patrol Guide explicitly states that such a firearm discharge is only justified if deadly physical force is being used *through means other than the vehicle itself*. Here, the only force being used came from the operation of the SUV; there was no use of deadly physical force from any other source. This was not, for instance, a case where an occupant of the SUV was shooting a gun at somebody. Rather, to the extent that any deadly physical force was being used here, the instrument of that force was the SUV itself, and nothing else. As such, Respondent's act of discharging his firearm was prohibited

Respondent also argues that firing his weapon was justified as a response to a vehicle ramming attack, defined in section 221-01 of the Patrol Guide as "a form of attack in which a perpetrator deliberately rams a motor vehicle into a crowd of people or building." This argument, too, is unsupported by the credible evidence. To be sure, as events were unfolding, Respondent did not have the benefit of being fully informed as to Person A's motivation, which was to extricate himself from the fight that was occurring inside the garage. Respondent also was unaware that Person A struck him inadvertently, in his haste to get away from the garage.

Even so, based on the information that Respondent did possess, it was not reasonable for him to conclude that this was a vehicle ramming attack. The officers were responding to a call of a large fight at the location, and their observations upon arrival were consistent with just that. The fact that the first vehicle that Respondent saw sped off without striking anyone was indicative of someone trying to get away from the fight inside. There was no indication that the

SUV was swerving toward people, or otherwise being driven in a way designed to "continuously run down unsuspecting members of the public," as described in the training memo upon which Respondent relies. Indeed, Respondent himself did not appear convinced that this was a vehicle ramming attack, as he testified that the SUV was "possibly going to hit somebody else." Under the specific facts of this case, I find that there was not a reasonable basis for Respondent to treat this incident as a vehicle ramming attack.

As such, even the act of firing at the SUV's tire, as opposed to aiming for one of the occupants, constituted a wrongful use of force, in violation of the guidelines. The record has established, by a preponderance of the credible evidence, that Respondent wrongfully discharged his firearm at a moving vehicle. Accordingly, I find Respondent guilty.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on July 7, 1999. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached confidential memorandum. Respondent has no disciplinary record. He has received one medal for Meritorious Police Duty.

This tribunal is mindful that Respondent fired his weapon after being struck by the vehicle, and that he was concerned for the safety of others. Respondent shot only one time, at the SUV's tire, in an effort to stop the vehicle. Nevertheless, the Department guidelines make clear that discharging one's firearm is prohibited in such a situation, and there must be some accountability for Respondent's actions.

The Department Advocate recommends the forfeiture of fifteen (15) vacation days. That request is reasonable. In *Disciplinary Case No. 2013-10417* (Sept. 22, 2015), a 21-year captain

with no disciplinary record forfeited fifteen (15) vacation days for wrongfully discharging his service firearm two times at a moving vehicle; following a police chase, the driver struck the captain with his vehicle, and the captain fired two shots.

Taking into account the totality of circumstances and issues in this matter, and the relevant precedent, I recommend that Respondent forfeit fifteen (15) vacation days.

Respectfully submitted,



Jeff S. Adler
Assistant Deputy Commissioner Trials

APPROVED



SEP 7 2019
JAMES P. O'NEILL
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER WILLIAM INNES
TAX REGISTRY NO. 923973
DISCIPLINARY CASE NO. 2017-18139

Respondent was appointed to the Department on July 7, 1999.

On his last three annual performance evaluations, Respondent received 3.5 overall ratings of "Highly Competent/Competent" for 2014, 2015 and 2016. He has been awarded one medal for Meritorious Police Duty.

[REDACTED]

Respondent has no disciplinary history

For your consideration.

A handwritten signature in black ink, appearing to read "Jeff S. Adler".

Jeff S. Adler
Assistant Deputy Commissioner Trials